Supreme Court, U. S.
FILED
MAR 27 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-765 and 77-772

In the Supreme Court of the United States

OCTOBER TERM, 1977

BRUCE W. WADSWORTH, PETITIONER

v.

FRANCIS E. WHALAND

JAMES M. DAWSON, PETITIONER

v.

FRANCIS E. WHALAND

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in response to the Court's order of January 23, 1978, inviting the Solicitor General to express the views of the United States in these cases.[1]

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[1] These cases were decided by the district court in a single order on February 11, 1976 (No. 77-772, Pet. App. A-17 to A-26). The

QUESTION PRESENTED

Whether a New Hampshire statute requiring insurers who issue group health insurance policies to provide coverage for mental illness and emotional disorders is preempted by the Employee Retirement Income Security Act of 1974 (ERISA) when such policies are purchased by ERISA-covered employee benefit plans.[2]

STATEMENT

1. Petitioners are administrators of a number of health and welfare funds providing benefits to participants and beneficiaries in New Hampshire and other New England states. The funds are employee welfare benefit plans within the meaning of Section 3(1) of ERISA, 88 Stat. 833, 29 U.S.C. (Supp. V) 1002(1) (Pet. App. A–6), and are subject to the coverage of that Act. The plans are funded by employer contributions; with the exception of one plan, the level of contributions is set pursuant to collective bargaining agreements. The court of appeals described the

court of appeals consolidated the cases and rendered its decision on September 1, 1977. The opinion of the court of appeals (No. 77–772, Pet. App. A–1 to A–16) is reported at 562 F. 2d 70. (References to "Pet. App." in this memorandum are to the Appendix in No. 77–772).

[2] Petitioner in No. 77–765 designates (but does not develop) questions pertaining to preemption under Section 302 of the National Labor Relations Act, 61 Stat. 157, as amended, 29 U.S.C. 186, constitutionally impermissible burdens on interstate commerce, and denial of equal protection (No. 77–765, Pet. 2–3). These contentions, rejected by both the district court and the court of appeals, are not addressed herein.

setting of benefits under the plans as follows (Pet. App. A–6 to A–7):

> Each year the fund administrators meet with local unions to determine the types of coverage desired by the members. The fund administrators must obtain, at the least possible cost, the coverage chosen. To fulfill this obligation the fund administrators, with the aid of insurance consultants, put together packages upon which they request sealed bids from insurance companies. Although the funds are self-insurers on a few benefits, approximately 90 per cent of the benefits are provided through group insurance policies.

2. A New Hampshire statute, Chapter 57 of the Laws of 1976, N.H. Rev. Stat. Ann. §§ 415: 18–a, 419: 5–a and 420: 5–a (hereafter "Chapter 57"), requires insurers issuing group health insurance policies to groups having members residing and employed in New Hampshire to include in such policies coverage for treatment of mental illness and emotional disorders.[3] The plans administered by petitioners have not heretofore provided such benefits to their participants and beneficiaries.

[3] N.H. Rev. Stat. Ann. § 415:18–a(I) (1976) provides in part: "Each insurer that issues or renews any policy of group or blanket accident or health insurance providing benefits for medical or hospital expenses, shall provide to each group, or to the portion of each group comprised of certificate holders of such insurance who are residents of this state and whose principal place of employment is in this state, coverage for expenses arising from the treatment of mental illnesses and emotional disorders * * *." Chapter 57 is reproduced in full at Pet. App. A–30 to A–38.

3. Petitioners filed suit in the District Court for the District of New Hampshire seeking declaratory and injunctive relief. They alleged, *inter alia,* that Chapter 57 is a law which "relates to" employee benefit plans within the meaning of Section 514(a) of ERISA, 29 U.S.C. (Supp. V) 1144(a), and is thus preempted under that section.[4]

The district court rejected petitioners' arguments and entered judgment for the respondent Commissioner of Insurance (Pet. App. A–17 to A–25). It held that Chapter 57 is a state law regulating insurance and thus is saved from preemption by Section 514(b)(2)(A) of ERISA, 29 U.S.C. (Supp. V) 1144(b)(2)(A).[5] Relying additionally on the language of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 15 U.S.C. 1012(b),[6] the district court found that Congress intended to except from preemption state laws which regulate insurance.

4. The court of appeals affirmed (Pet. App. A–1 to A–16). The court determined that Chapter 57 "was

[4] Section 514(a) provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). * * *"

[5] Section 514(b)(2)(A) provides: "Except as provided in subparagraph (B) [discussed at page 7–8, *infra*], nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

[6] 15 U.S.C. 1012(b) provides in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *."

codified as an insurance law and specifically relates to insurers,' not to employee benefit plans (Pet. App. A–9 to A–10).[7] The court held that although "Chapter 57 is a state law which indirectly relates to employee benefit plans, and is subject to preemption" (Pet. App. A–11),[8] it is saved from preemption by Section 514(b)(2)(A)[9] because it is a law which "regulate[s] insurance" (*ibid.*).

The court of appeals rejected petitioners' contention that a different result was required by Section 514(b)(2)(B) of ERISA, 29 U.S.C. (Supp. V) 1144(b)(2)(B),[10] which bars the states from deeming em-

[7] The court of appeals rejected the State's contention that ERISA preempts only state laws which actually conflict with ERISA (Pet. App. A–10; emphasis in original): "The legislative history manifests that Congress intended to preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA."

[8] Section 514(c)(2) of ERISA, 29 U.S.C. (Supp. V) 1144(c)(2), subjects to preemption under Section 514(a) any state law "which purports to regulate, directly or *indirectly*, the terms and conditions of employee benefit plans covered by this title" (emphasis supplied).

[9] See note 5, *supra*.

[10] Section 514(b)(2)(B) provides: "Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." Section 514(b)(2)(B), said the court, "does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans" (Pet. App. A–12).

ployee benefit plans to be insurers, or in the business of insurance, in order to regulate such plans under the savings provision in Section 514(b)(2)(A). To accept that contention, the court stated, "we would have to construe § 514 without its savings clause pertaining to state regulation of insurance. This we cannot do; we must interpret the statute as written" (Pet. App. A–12).

DISCUSSION

1. The court of appeals correctly interpreted Section 514 of ERISA and properly applied it to the facts of this case. There is no conflict with the decision of any other court of appeals, and review by this Court is not warranted.

Chapter 57 is a state law requiring insurers to include coverage for mental illness and emotional distress in any group health insurance policy they issue. As the court of appeals correctly determined, employee benefit plans are not insurers and thus are not directly subject to Chapter 57.

The court of appeals recognized, however, that Chapter 57 indirectly regulates employee benefit plans (and all other insureds) by limiting the choices available to them if they choose to buy insurance. Because Section 514(c)(2) subjects to preemption even those state laws which indirectly regulate plans, the court of appeals found that Chapter 57 would be subject to preemption. At this point, however, Section 514(b)(2)(A) comes into play; that subsection saves from preemption any state law which "regulates insurance."

This savings provision would be meaningless unless it saved from preemption state laws regulating insurance which also indirectly regulate employee benefit plans, since no other state law regulating insurance would be subject to preemption under the Act even in the absence of the savings provision. Chapter 57 obviously "regulates insurance," and thus the court correctly found that Congress intended that law and others like it to remain effective regardless of ERISA's otherwise broad preemption of state laws relating to plans.

Congress, however, did not wish the broad exception it had created for regulation of insurance to swallow up the prohibition on the regulation of employee benefit plans. It therefore provided in Section 514(b)(2)(B), 29 U.S.C. (Supp. V) 1144(b)(2)(B), that no state could deem an employee benefit plan to be an insurance company, or to be engaged in the business of insurance, for purposes of "regulating" insurance. This "deemer" clause simply prohibits the states from doing through their insurance laws what Congress has prohibited them from doing through other laws. It does not, as the court of appeals recognized, prohibit a state from regulating bona fide insurers (as Chapter 57 does) when those insurers do business with employee benefit plans. If it did, "[i]t would nullify all state insurance laws concerning group insurance when the group policy is issued to an employee benefit plan" (Pet. App. A–13). There is no evidence that "Congress meant to so re-

strict a state's authority to regulate insurance" (*ibid.*). The fact that the purchaser of insurance is an employee benefit plan is immaterial; Congress did not intend to confer any special exemption or privilege on them as insurance buyers. Insurance sales to them must conform to the same rules as those to any other insurance buyer, and if a state determines, as New Hampshire has done here, that all group health insurance sold in the state must provide coverage for mental and emotional disturbance, the plans may purchase no other.

2. The petitioners expose no error in the reasoning of the court of appeals or in its interpretation of Section 514. Instead they broadly seek "[a] final resolution of the ERISA preemption issue" (No. 77–772, Pet. 4) and ask this Court to "settle the conflict" which allegedly exists "between state regulators and the Department of Labor" (No. 77–765, Pet. 18).[11] They urge that "A ruling to the effect that all state laws are preempted from application to employee benefit plans would insure a uniformity of regulation for employee benefit plans across the country" (No. 77–772, Pet. 4).

[11] As this memorandum demonstrates, there is no conflict between state regulators and the Department of Labor on the question presented by this case. The administrative opinions cited by petitioner in No. 77–765 (Pet. 14–15) concern state laws which attempted to regulate benefits the plans themselves provided to beneficiaries. Chapter 57 does not regulate such benefits. Any plan which chooses to become a self-insurer in New Hampshire may dispense with mental illness coverage, because Chapter 57 requires only that insurers provide such coverage to group insureds. A state law attempting to prescribe the coverage which plans must provide their participants would not be a law "regulating insurance" and would be preempted by ERISA.

The difficulty with this approach is that, contrary to petitioners' contention, there is no single "ERISA preemption issue" where state laws regulating insurance are concerned. Congress guaranteed that there would be no single preemption issue under ERISA when it saved insurance laws from preemption. Rather, each case must be decided on its facts, and the courts are doing that job as Congress intended. Congress preserved authority in the states to regulate insurance, and if petitioners find the result burdensome their recourse is to Congress, or to the state legislatures, rather than to this Court.

The decisions cited by petitioners as conflicting with the decision in this case (No. 77–765, Pet. 18–20; No. 77–772, Pet. 5–6) are not in conflict. Those decisions examine ERISA preemption of state laws in a variety of legal and factual contexts, but there is no decision that a state law requiring insurers to provide certain coverage is preempted by ERISA, nor is there any pending litigation which raises that question, as far as we are aware.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978